# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# CIVIL APPELLATE JURISDICTION

## FIRST APPEAL NO.482 OF 2005

Smt. Shobha Shriram Mhalagai
Adult, Residing at 495, Shaniwar Peth
Pune-30. ...Appellant

Vs.

1. Shri Pradip Laxmanrao Badhe
   Age 34 years, Occ: Business
   Residing at 1187/68, Shivajinagar
   Pune 411 005.

2. Ravi Shinde And Associates
   A Proprietory Concern
   Represented by its Proprietor
   Shri Ravi Shinde
   Residing at Mugdhai Apartment
   Pandurang Colony, 15/31,
   Erandwane, Pune 411 004.

3. Mrs. Lata Ravi Shinde
   Residing at Mugdhai Apartments
   Pandurang Colony, 15/31 Erandwane
   Pune 411 004.

4. Saraswat Co-operative Bank Ltd.
   A Scheduled Co-operative Bank
   Registered according to the provisions
   of Maharashtra Co-operative Societies
   Act, 1960 and also under Multi State
   Co-operative Societies Act,
   one of the branch offices at Karve Road
   Branch, Pune. ...Respondents

Mr.P.S.Dani, Adv. for Appellant
Mr.R.S. Apte with Mr. N.R. Bubna Adv. for Respondent No.1
Mr. H.V.Bhadbhade Adv. For Respondent No.4.
Mr. H.S. Venegaonkar for Respondent No.2 and 3

**CORAM: H.L. GOKHALE &**
**ROSHAN DALVI, JJ.**
**JUDGMENT RESERVED ON : 7th October 2005**
**DELIVERED ON : 26th OCTOBER, 2005.**

**JUDGMENT (PER ROSHAN DALVI, J.)**

1. The Appellant is the Decree Holder in respect of a decree passed in Suit No.97 of 1992 in the Court of the Civil Judge (S.D.) Pune. The decree holder applied for execution of the decree and obtained the order of attachment in respect of a car of Mercdez Benz make bearing registration No.MH -12/SA-0001 against the Judgment Debtor. The Judgment Debtor had sought to sell the car to his wife who applied for a loan from Saraswat Co-operative Bank Limited (the Bank) and which car upon her default came to be auctioned and sold by the said Bank to Respondent No.1 as the Auction Purchaser. Upon the car being seized in execution of the order of attachment, Respondent No.1 applied to the Civil Judge (SD) Pune for raising the attachment. The order came to be passed allowing the said attachment and declaring the auction purchaser the owner of the car and entitled to its custody. The decree holder has filed this first appeal challenging the said order.

2. The material aspect to consider in this appeal is whether the Judgment Debtor was the owner of the car on the date of the order of attachment or whether he had transferred the attached property prior thereto as claimed by him.

3. It has been contended on behalf of the Auction Purchaser (who is Respondent No.1 herein) and who was an applicant before the learned Civil Judge (S.D), Pune that he is bona fide purchaser for value without notice of the claim of the Decree Holder, in as much as the order of attachment was obtained after the sale of the car by the Judgment Debtor to his wife and upon whose defaults to the Bank the Auction Purchaser came to purchase it.

4. It is contended on behalf of the Decree Holder who was Opponent No.1 to the said application, that the sale by the Judgment Debtor after passing of the decree was malafide and made with a view to overreach the said decree and that the title to the property remained with the Judgment Debtor. The wife of the Judgment Debtor could not transfer the said car to the Auction Purchaser as she had no title thereto.

5. It is indeed true that the transaction of a car between the husband and wife when a decree has been passed against the husband and is in the process of being executed, primafacie shows lack of bonafides. However, the true position in law

restricts the Judgment Debtor not to transfer any of his properties only after the order of attachment is passed and served upon him in respect of such property.

6. It would therefore have to be seen whether the Judgment Debtor had notice that the order of attachment, was passed when he sought to transfer the car to his wife. A chronology of certain events and dates becomes material in this behalf.

(a). The Decree was passed in the aforesaid suit on 15th July 1998 for Rs.1255636/- .

(b) A warrant of attachment was taken out by the Decree Holder on 5th January 2000.

(c) The Judgment Debtor sought to sell the car, which is the property mentioned in the warrant of attachment, to his wife on 11th January 2000.

*This is shown by way of certain documents executed by the Judgment Debtor as well as his wife as the guarantor and the principal borrower respectively with the aforesaid Bank on 11th January 2000. Hence, the wife of the Judgment Debtor obtained a loan from the Bank to purchase the car from her husband. For the purpose of that loan she has submitted an application for loan to the Bank which is undated. Her husband is the only surety.*

*She has executed a Promissory Note promising to*

*repay the said sum of Rs.5 lakhs along with minimum interest of 15.25% per annum. She has also executed a letter of lien and a Deed of Hypothication in favour of the Bank. Her husband has executed a letter of guarantee all on the same day. We are told that the transaction for grant of loan for purchase of a car is on "spot financing" basis. The transaction is completed within 24 hours and in such a case a surety is not even required because the Bank hypothicates the car itself.*

*The Bank has executed a letter on 11th January 2000 itself sanctioning a loan of Rs.5 lakhs.*

*Mr. Bhadbhade, learned Counsel, on behalf of the Bank has produced the Loan Register kept by the Bank in the ordinary course of its business showing this loan entry amongst others of that period. He has also produced a certified extract of the ledger account of the bank showing the transactions of loan as well as the cheque issued by the Bank granting the said loan in favour of the Judgment Debtor as the seller of the car.*

(d) Upon the said hypothication the entry of transfer came to be made in the Registration Certificate relating of the said car on 18th January 2000. The car therefore stood transferred from the Judgment Debtor (husband) to his wife on 18th January, 2000.

(e) The order of attachment passed on 24th January 2000 on the warrant of attachment dated 5th January 2000 was sought to be served upon the Judgment Debtor on 28th January 2000. It was served upon the wife of the Judgment Debtor. The Bailiff's report showing the inquiry made effecting the said service produced from the original record and proceedings shows the service upon the wife and the fact that she created a law and order situation. It has been signed by the wife on 28th January 2000.

*The wife did not inform the Bailliff that the car sought to be attached under the warrant of attachment no longer belonged to the Judgment Debtor, her husband or that it was already sold to her.*

(f) On the same day the Judgment Debtor applied for stay of execution before the Civil Judge (S.D.) Pune and was asked to deposit substantial amount upon the order of stay being granted.

(g) On the same day 28th January 2000 the Decree Holder obtained an order of injunction against the Judgment Debtor preventing alienation of the said property.

*The Judgment Debtor also did not inform the Court that*

*he had already alienated and transferred the said property being the said car mentioned in the application of execution to his wife a week before.*

(h) The Judgment Debtor has made part payment of Rs.1 lakh on 7th February 2000.

*We are told that such other cheques had also been given aggregating to Rs.5 Lakhs but which have been dishonoured.*

(i) The wife of the Judgment Debtor defaulted in making payments of the installments of the loan granted by the Bank. The Bank issued its notice to the Judgment Debtor as well as his wife as the guarantor and the principal borrower respectively on 21st January 2003, stating that the Bank had seized the vehicle in January 2003 due to overdue payments and would be disposing off the vehicle to the highest offerer.

(j) The Bank obtained the valuation report in respect of the said car on 29th January 2003.

*The car was valued at Rs. 7 Lakhs.*

*Until that time the attachment order granted by the Court was not entered in the records of the relevant RTO.*

The Bank put up its notice, in the normal course of its conduct, for sale interalia of said car amongst other vehicles for which loans remained outstanding on 21st January 2003.

(k) The Auction Purchaser, Respondent No.1 herein, filled up the relevant printed form of the Bank offering Rs.811000/- in cash for the said car to the Bank on 12th February 2003. The Bank sold the said car to the Auction Purchaser.

(l) Thereafter the Baillif attached the said car by seizure and produced it before the Civil Court (S.D.) Pune on 29th January 2004 from the custody of the Auction Purchaser/ Respondent No.1.

(m) Upon an application made for lifting

the attachment by the Auction Purchaser/Respondent No.1 the impugned order has been passed on 4th February 2004.

(n) It can be therefore seen that though the Judgment Debtor has indeed tried to create a transfer which cannot inspire any confidence in the Court during the time the application for execution was pending, he has actually succeeded in transferring the said vehicle to his wife upon she obtaining the loan from the Bank a number of days prior to the issue of warrant of attachment and its service upon him. The time taken by the Decree Holder to have the warrant of attachment issued was about 18 months from the date of the Decree. The decree Holder did not take any steps to inform the R.T.O. of the warrant of the attachment being issued. In fact she could not inform the RTO until the car was seized in attachment and brought to the Court. Consequently neither the Bank nor the subsequent transferee who is the Auction Purchaser, had any knowledge or information about the execution proceeding

against the Judgment Debtor or the wife, the borrower of the Bank, to whom the car was sought to be transferred. Though such act of the Judgment Debtor may be taken to be an act to overreach the process of law, it cannot be said to be an illegal act. The Decree Holder has alleged malafides and collusion between the Judgment Debtor, his wife and the Bank. We have gone through the records of the Bank. The Bank has produced before us the original cheque itself issued by the Bank infavour of the Judgment Debtor upon the loan being

sanctioned to his wife. That shows the transaction of sale between the Judgment Debtor and his wife.

7. The learned Judge in the impugned Judgment has considered each of these facts. He has also considered the most material aspect namely that the R.T.O. Was not informed of the order of attachment passed until as late as 9th January 2004 by the Decree Holder. Even a copy of that notice sent by the Decree Holder to the RTO has not been produced by her in the proceedings before the trial Court. It is from a letter dated 13th January 2004 of the R.T.O., which is marked and exhibited in the proceedings taken out by the Auction

Purchaser as the applicant under Order 21 Rule 58 of the C.P.C., that the learned Judge has observed that the first time a notice to the R.T.O. Was made on 9th January 2004. This is evident from the letter of R.T.O. Dated 13th January 2004 produced in the evidence which makes a reference to the said letter of Decree Holder dated 9th January 2004. It can be seen that no letter has been sent to the R.T.O., before the actual attachment by seizure of the said car. The Decree Holder could have informed the R.T.O. Of the said fact much earlier upon the order of attachment being passed and served upon the Judgment Debtor. She failed to do so. Even a bare notice of a claim, until then in process, could not therefore be imputed either upon the Bank or the subsequent transferee for value the Respondent No.1 herein.

8. Despite the actions of the Judgment Debtor which are not very straight, it is impossible to restore the car to the Decree Holder. Consequently the attachment by seizure of the said car is indeed required to be raised. Hence, the order of the learned Judge granting the application of the Auction Purchaser, Respondent No.1 herein and allowing him to retain the custody of the car upon release of the attachment cannot be faulted. It is argued on behalf of the Decree Holder that the entire transaction with the Bank smacks of malafides, because the application of the loan complete with its grant by the issue of the cheque of the Bank has been commenced and completed within a single day. Similarly the procedure for

recovery by the Bank has also been commenced and concluded only on 12th February 2003 without any tender notice being issued in the press.

9. It may be mentioned that in present times personal loans are granted to parties for varied reasons. A loan such as this for purchase of car is granted under the Bank's spot finance scheme. The transaction between the Bank and its borrower is governed by the terms of the contract. That entitles the bank to seize the car if installments of the loan are not promptly and regularly paid. The Bank has produced copies of its letters and notices sent to the Judgment Debtor and his wife as the guarantor and the principal borrower since October 2000. The procedure followed by the Bank is neither unusual, nor illegal. The Bank had no knowledge or information about any charge created in favour of the Decree Holder. In fact none was created and none could be until the order of attachment was actually executed by the attachment itself which would be by seizure of the movable property, the car in this case. That took place only as late as on 29th January 2004, well after the transfer for consideration infavour of the Auction Purchaser, Respondent No.1 herein. We see no infirmity in the transaction of the Bank.

10. Our attention has been drawn to Section 4 of the Sale of Goods Act by Mr. Dani learned Counsel for the Appellant/Decree Holder. He emphasis that a contract of sale

of goods is a contract whereby the seller transfers goods in the property to the buyer for a price. He contends that the contract between the husband and wife necessarily has no specific price and none is shown in this case. It is true that the Judgment Debtor has not led any evidence that he has sold the said car to his wife for a specified price. However, Mr. Bhadbhade on behalf of the Bank states that pursuant to the loan taken by the wife of the Judgment Debtor the Bank has issued its cheque directly to the Judgment Debtor. He has produced the said cheque. Technically therefore that is the price paid by the buyer of the car, the Judgment Debtor's wife to the seller, the Judgment Debtor. The mode of payment is therefore medium of the Bank upon taking the loan. It cannot therefore, be said that the contract does not specify the price or that it is a void contract as being without consideration. However, it is present to our mind that in the circumstances in which the Judgment Debtor was on the date of purported sale, he did try to overreach the law by that mode. The question before us is what would be the rights of the third parties who come into picture consequent upon such a contract.

11. The Judgment Debtor's wife, who came to be the owner of the car upon the price being paid by her, defaulted in the payment of installments constraining the Bank to seize the car and to sell it by auction to the Respondent No.1. The Auction Purchaser did not know the facts and circumstances that transpired before Judgment Debtor's wife entered into the

Loan Agreement and breached it. He is undoubtedly a bonafide purchaser for consideration and without notice of the antecedents of the defaulter of the Bank.

12. The Court has therefore to consider the rights and entitlements of the Decree Holder qua the auction purchaser. The Decree Holder has not been as diligent as she should have been. All that she did was to obtain on 15th July 1998 an Ex-Parte Decree against the Judgment Debtor. The Decree Holder sought to execute it more than 18 months thereafter. The service of the attachment order was made for the first time on 28th January 2000 before which rights in respect of the property came to be transferred in the manner stated above. The Decree Holder is therefore, responsible for the consequences of such transfer which was affected in the meanwhile.

13. Mr. Dani has argued that the fact that the Decree Holder did not even submit himself to the authority of law and appear in the Court after the order of attachment was served upon him and did not submit himself to cross examine by entering the witness box, must require adverse inference drawn against him. That is indeed true. We have no hesitation in holding that had the Judgment Debtor appeared in Court and been cross examined, the intention for the sale of the car to none other than his wife could have indeed been brought out. However, even without that exercise the intention is clear.

However, that does not make the auction illegal.

14. Mr. Dani relied upon the Judgment relating to the production of the best evidence available to the parties in the case of ***Naranbhai Marghabhai Patel Vs. Dhulabhai Galbabhai reported in AIR 1992 S C 2009.*** However, that Judgment also goes only as far as the drawing of adverse inference.

15. In order to protect the order lifting the attachment, Mr. Bubna on behalf of the Auction Purchaser has relied upon the judgment in the case of ***E.P. Royappa Vs. State of Tamil Nadu reported in AIR 1974 S C 555*** in which it has been held that the burden of establishing mala fides is heavy on the person who alleges it, and that a proof of high order is required for its credibility considering its circumstances. Though therefore, adverse inference may be drawn, the transaction cannot be vitiated on the ground of malafides, which are only apparent and not specifically proved, the Auction Purchaser being the bona fide purchaser for value without notice.

16. It can therefore, be seen that though this is made out to be a case for grant of compensatory costs against the defaulting, though absent, Judgment Debtor, who is the Respondent in this Appeal, it is not a case for upholding the attachment made by the Decree Holder upon the car No.MH-

12/SA 0001 in Special Darkhast No.15 of 2000 in the Court of 5th Joint Civil Judge (S.D.), Pune.

17. Hence, the following order.

O R D E R

(1) The Appeal from the order of the 5th Joint Civil Judge (S.D.) Pune dated 4th February 2005 is dismissed.

(2) The order on the Application of the Auction Purchaser staying the attachment on the Mercdez Benz car bearing No.MH-12/SA-0001 in Special Darkhast No.15 of 2000 passed by the 5th Joint Civil Judge (S.D.) Pune is confirmed.

(3) The car is in the possession and custody of the Auction Purchaser and is allowed to be continued in his custody.

(4) The Auction Purchaser has paid the Bank Rs.8,11,000/- . The valuation of the car put by the Bank is Rs.7 Lakhs.

(5) Mr. Badhbhade on behalf of the Bank confirms that the Bank holds a sum of Rs.1,03,300/- which is surplus upon the sale of the car. He offers that amount to be paid to the Decree Holder. The Bank shall pay this surplus amount of Rs.1,03,300/- to the Decree Holder.

(6) The said amount shall be appropriated as follows :

A sum of Rs.50,000/- shall be appropriated by the Decree Holder as cost of this execution application recoverable from the Judgment Debtor. The remaining amount shall be appropriated towards the satisfaction of the Decree.

(7). The Decree Holder shall be entitled to take out further execution proceedings by any of the modes contemplated under Section 21 of the C.P.C Including the arrest of the Judgment Debtor.

(H.L. GOKALE, J.)

(ROSHAN DALVI, J.)